SUPREME COURT OF THE UNITED STATES.

No. ~~351.~~ 2994

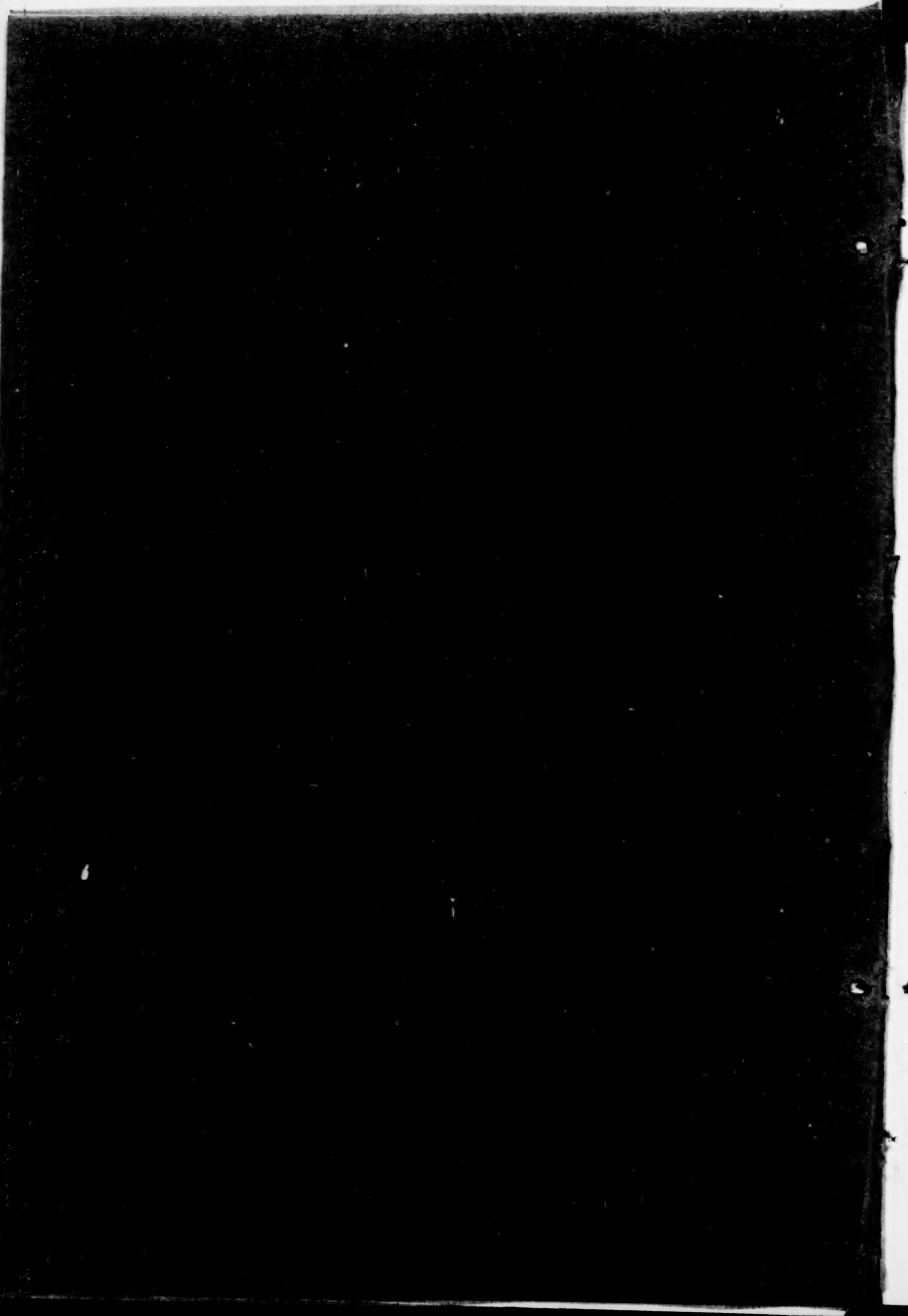
WILFORD L. WILSON, ASSIGNEE OF DOUGLASS W. VANDERHOOF AND ANDREW J. VANDERHOOF, BANKRUPTS, COMPLAINANTS,

vs.

THE CITY BANK OF SAINT PAUL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED DECEMBER 18, 1871.



1 UNITED STATES OF AMERICA,
District of Minnesota, ss:

At a circuit court of the United States of America for the district of Minnesota, begun and held at St. Paul, in said district, on the third Monday, being *being* the nineteenth day of June, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-fifth—

Present, Hon. John F. Dillon and Hon. Rensselaer R. Nelson, judges.

WILFORD L. WILSON, ASSIGNEE OF DOUGLASS W. Vanderhoof and Andrew J. Vanderhoof, bankrupts,
vs.
THE CITY BANK OF SAINT PAUL.

The complainant is the assignee in bankruptcy of the firm of Vanderhoof Bros., lately merchants in the city of Saint Paul. The defendant is the City Bank of Saint Paul. The bill is filed to determine which of the parties is entitled to the stock of goods of the bankrupts or the proceeds thereof. The assignee claims the goods or the proceeds thereof as assets of the bankrupts' estate. The Bank claims the same by virtue of a judgment, execution, and levy thereunder. The facts are as follows:

2 On the 26th of February, 1870, judgment by default was rendered by one of the district courts of the State of Minnesota in favor of the bank against Vanderhoof Bros. for the sum of $2,130. On the same day execution was issued, and the sheriff immediatly made a levy upon the whole stock of goods of the debtors which was sold by him for $2,385, which is now in the hands of the bankrupt court to await the determination of this suit. The suit by the bank was brought on promissory notes, commercial paper made by the debtors Vanderhoof Bros. to the City Bank of Saint Paul, one of which notes was more than fourteen days past due when suit was brought thereon by the bank.

After the levy of the said execution and before the sale by the sheriff, Vanderhoof Bros. were adjudicated bankrupts on the petition of creditors filed against them after judgment had been obtained and levy made under the execution. The Vanderhoofs had no defense to the notes upon which the bank had sued them, and put in no defense. They had no property except their said stock in trade, which, at cost prices, was about equal to the amount of their liabilities.

The debtors Vanderhoof Bros. were insolvent when said suit was brought against them by the bank, and the bank had then reasonable cause to believe it, and knew that they had committed an act of
3 bankruptcy, and that they had no property but their said stock in trade. The Vanderhoofs gave no notice to any of their creditors of the suit commenced against them by the bank, and having no defense, did not defend it nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained or the levy of the execution.

On the trial the following questions arose in relation to which the judges were opposed in opinion.

I. Whether or not an intent on the part of said debtors, Vanderhoof Bros., to suffer their property to be taken on legal process, to wit, the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts?

II. Whether, under said facts, the said bank in obtaining said judgment and making the said levy had reasonable cause to believe that a fraud on the bankrupt act was intended.

III. Whether, under said facts, the bank obtained by the levy of its execution a valid lien on the said goods as against the assignee in bankruptcy.

Whereupon, on motion of the defendants, by their counsel, that the points on which the disagreements hath happened may, during
4 the said term, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided, it is ordered that the said points of disagreement be, and they are hereby, certified according to the request of the defendants as aforesaid, and of the act of Congress in that case made and provided.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, Horatio E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby certify the foregoing to be a copy from the minutes of said court.

Witness my hand and the seal of said court, at Saint Paul, in said district, this 21st day of September, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-sixth.

[SEAL.] H. E. MANN, *Clerk.*

(Indorsed:) United States circuit court, district of Minnesota. Wilford L. Wilson, assignee of Vanderhoof Bros., bankrupts, vs. The City Bank of Saint Paul. Certificate of opposition in opinion.

(Indorsement on cover:) No. 551. Wilford L. Wilson, assignee of Douglass W. Vanderhoof and Andrew J. Vanderhoof, bankrupts, complainants, vs. The City Bank of Saint Paul. Certificate of division. Minnesota C. C. U. S. Filed 18th December, 1871.

SUPREME COURT

OF THE

UNITED STATES.

DECEMBER TERM, 1871.

W. L. WILSON, ASSIGNEE,
Complainant.

vs.

CITY BANK OF ST. PAUL,
Defendant.

M. LAMPREY,
Counsel for Complainant.

SUPREME COURT

OF THE

UNITED STATES.

WILFORD L. WILSON, Assignee of Vanderhoff Bros., Complainant,

against

THE CITY BANK OF ST. PAUL, Defendant.

ARGUMENT OF COMPLAINANT.

The certificate of disagreement, signed by Judges Dillon and Nelson, of the United States Circuit Court for the District of Minnesota, in this cause and on file in this court, sets out the following important facts:

The debtors, Vanderhoof Bros., were insolvent when suit was brought against them by the Bank, and the Bank had then reasonable cause to believe it, and knew that they had committed an act of bankruptcy.

After levy of execution, but before sale thereunder, the Vanderhoof Bros. were adjudicated bankrupts, on petition filed after judgment was obtained and levy made.

The execution was levied upon the entire assets of the Vanderhoof Bros., all of which were sold to satisfy the judgment of the Bank.

The Vanderhoofs gave no notice to any of their other creditors of the commencement of the suit by the Bank, and having no defence, did not defend it, nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained, or the levy of the execution made.

I.

Being insolvent, Vanderhoof Bros. suffered their entire stock of goods to be seized on execution on the judgment by default, obtained against them by the Bank, with intent to give a preference to the Bank over their other creditors, and in fraud of the 35th and 39th sections of the Bankrupt Act.

(1.) Vanderhoof Bros. suffered their property to be seized.

See In re Dibblee 2, *B. R.* 185-187.

(2). The suffering their property to be seized on execution, was a transfer of the property, within the meaning of the 35th and 39th sections of the act.

1 *B. R.*, 81-82, *In re Black and Secor.*

2 *B. R.*, 149-150. *Wilson vs. Brinkman et al.*

2 *B. R.*, 155, *In re Joseph B. Wright.*

2 *B. R.*, 164-165, *Fitch et al. vs. McGie.*

3 *B. R.*, 149, *Driggs vs. Moore et al.*

5 *B. R.*, 361, *Hood et al. vs. Karper et al.*

The Bank stands in no better position than if Vanderhoof Bros. had paid the debt in money or in goods.

7 *Howard*, 645, *Shawhan vs. Wherritt et al.*

4 *B. R.*, 134, *Smith vs. Buchanan et al.*

5 *B. R.*, 274, *Wilson vs. City Bank; Opinion of Dillon, C. J.*

(3.) It was a transfer out of the usual and ordinary course of Vanderhoof Bros. business, and therefore *prima facia* fraudulent.

Bankrupt Act, sec. 35.

For

(*a*) It can never be in the usual and ordinary course of business for a trader to pay his creditor by means of a levy on execution.

(*b*) It was the transfer of the whole of a trader's stock in trade, and their entire property, to pay a pre-existing debt. Such a transfer necessarily breaks up their business and cannot be in the usual and ordinary course of business. It is in itself an act of bankruptcy and a fraud upon the Bankrupt Act.

1 *B. R.*, 155, *Inre Langley exp. Perry.*

2 *B. R.*, 69, *Grow vs. Ballard et al.*

2 *B. R.*, 116, *Re Gay.*

2 *B. R.*, 131-132, *Foster vs. Hackley et al.*

3 *B. R.* 37, *Re Batchelder.*

3 *B. R.*, 93-95, *In re Graham vs. Stark et al.*

4 *B. R.*, 114-116, *Rison vs. Knapp.* (*Affirmed in Circuit Court—Miller, C. J.*)

(4.) The necessary consequence of Vanderhoof Bros'. suffering their entire stock in trade, and their entire property to be levied on, was to break up their business and put

it out of their power to pay their other creditors. It appropriated their whole property to the payment of a single creditor, putting the property into the hands of that creditor, enabling him to pay himself in full, without regard to whether other creditors were paid or not, and thereby necessarily gave a preference to that creditor.

It was an act of bankruptcy, and under the circumstances, it was almost inevitable that Vanderhoof Bros.' other and unpreferred creditors should proceed against them in bankruptcy (as has actually been the case), in which event the effect of Vanderhoof Bros.' suffering the levy is to impede, hinder and delay the operation of the Bankrupt Act.

Vanderhoof Bros. must be presumed to have intended these natural and legal consequences of their conduct; they might have prevented them by filing their petition in voluntary bankruptcy. Not having done so but having suffered a creditor to obtain a preference which they might have prevented, they must be presumed to have intended to give such preference.

2 *Cush.*, 160–169, *Denney vs. Dana et al.*
13 *Gray*, 18–21, *Beals vs. Clark et al.*
1 *B. R.* 10–11, *In re Drummond.*
1 *B. R.*, 81-82, *In re Black and Secor.*
1 *B. R.*, 89, *In re Craft.*
1 *B. R.*, 140, *In re Sutherland.*
2 *B. R.*, 129–130, *Haughey vs. Albin.*
2 *B. R.* 131–132, *Foster vs. Hackley et al.*
2 *B. R.*, 164–165, *In re Fitch et al. vs McGie.*
2 *B. R.*, 181–182, *Farrin vs. Crawford et al.*
2 *B. R.*, 185, *In re Dibblee.*
3 *B. R.*, 4–5, *In re Randall & Sunderland.*
3 *B. R.*, 29–30, *Ahl et al. vs. Thorner.*

3 *B. R.*, 93–94, *In re Graham vs. Stark et al.*
3 *B. R.*, 95, *In re Wells.*
3 *B. R.*, 98, *In re Smith.*
3 *B. R.*, 99–100, *In re Clark and Bininger.*
4 *B. R.*, 77–79, *same case on appeal.*
3 *B. R.*, 124–125, *Campbell vs. The Traders' Bank et al.*
3 *B. R.*, 149, *In re Driggs vs. Moore et al.*
4 *B. R.*, 33–34, *In re Terry and Cleaver.*
4 *B. R.*, 37–38, *In re Bloss.*
4 *B. R.*, 114–116, *Rison vs. Knapp.*
4 *B. R.*, 158, *Martin vs. Tool et al.*

The two last cases affirmed on appeal to the Circuit Court by Miller, C. J.

4 *B. R.*, 173, *In re Silverman.*

II.

The Bank and its cashier having knowledge of Vanderhooff Bro's. acts of bankruptcy, and having also knowledge of Vanderhooff Bro's insolvency, or at least reasonable cause to believe them insolvent, had also reasonable cause to believe that a fraud upon the Bankrupt Act was intended by Vanderhooff Bros', and in fact did themselves intend to obtain a preference in fraud of the act.

1 It follows as a necessary conclusion that if the Bank and its cashier had reasonable cause to believe Vanderhooff Bros. insolvent, "they had reason to believe that Vanderhooff Bros. in neglecting to make payment of their debts, in submitting to suit and in neglecting to take the steps contemplated by the Bankrupt Act for the purpose and equal benefit of all their creditors according to the plain intent

and purport of the law, were acting in fraud of the law itself."

5 *B. R.*, 274, *Wilson vs. City Bank, opinion of Dillon, C. J.*

5 *B. R.*, 361–364, *Hood et al. vs. Karper et al.*

4 *B. R.*, 134, *Smith vs. Buchanan et al.*

They had reason to believe that if they seized all Vanderhooff Bros' goods on execution the Bank would obtain a preference over their other creditors, and thereby a fraud on the act would be perpetrated. They as well as Vanderhooff Bros. must be presumed to have intended the consequences of their conduct, and these consequences were to give the Bank a preference and to prevent the property from being distributed equally among all Vanderhooff Bros' creditors under the provisions of the Bankrupt Act.

2. The transfer effected by the levy being out of the usual and ordinary course of Vanderhooff Bros' business, was *prima facie* evidence to the Bank of fraud.

III.

The defendant, the City Bank, after acts of bankruptcy of Vanderhooff Bros. of which it and its cashier had full knowledge, and with reasonable cause to believe Vanderhooff Bros. insolvent, could not by proceeding in a State court obtain a valid lien and seize the property of the bankrupt to the exclusion of their other creditors. This is said by the Supreme Court of the United States in *Shawhan vs. Wherritt et al.*, to be "the chief and important question involved" in that case, and it was there held that such a proceeding on the part of the creditor was a fraud upon the Bankrupt Act, and therefore void.

7 *Howard*, 627, 644, 645, *Shawhan vs. Wherritt et al.*

A security or priority gained by suit in a State court, stands on no better footing than a payment made by the bankrupt to a creditor. *Id.*, *p.* 645, 646. The decision in *Shawhan vs. Wherritt et al.*, applies with even greater force under the act of 1867 than under the act of 1841, and has been followed accordingly.

1 *B. R.*, 81–82, *In re Black and Secor.*
2 *B. R.*, 164–165, *In re Fitch et al. vs. McGie.*
3 *B. R.*, 84–85, *In re Kingsbury et al.*
3 *B. R.*, 53–54, *White vs. Raftery.*
3 *B. R.*, 93–95, *In re Graham vs. Stark et al.*
3 *B. R.*, 106–107, *In re Davidson.*
4 *B. R.*, 106–109, *Beattie vs. Gardner et al.*
4 *B. R.*, 134, *Smith vs. Buchanan et al.*
4 *B. R.*, 150, *In re Gregg.*
5 *B. R.*, 274, *Wilson vs. City Bank*, opinion of Dillon, *C. J.*

E. G. Lapsley

~~MORRIS LAMPREY,~~
Counsel for Complainant.

St. Paul, Minn.

SUPREME COURT

OF THE

UNITED STATES.

DECEMBER TERM, 1871.

W. L. WILSON, ASSIGNEE,
Complainant.

vs.

CITY BANK OF ST. PAUL,
Defendant.

ARGUMENT OF DEFENDANT.

SUPREME COURT

OF THE

UNITED STATES.

WILFORD L. WILSON, Assignee of Vanderhoff Bros., Complainant,

against

THE CITY BANK OF ST. PAUL, Defendant.

ARGUMENT OF DEFENDANT.

I.

Under the 35th and 39th Sections of the Bankrupt Act, the *intent* is as much a fact to be proven, as the *transfer*, or the *suffering*, or *procuring* property to be taken. If the intent is to be *inferred from the transfer*, then the qualifying words "with intent to give a preference," are meaningless.

There is no pretence of any collusion in this cause, no fraud in fact, nor was any intent as a matter of fact, shown.

There was no act or thing done, directly or indirectly, by Vanderhoof Bros. If *they had procured* their property to be taken, or *made a transfer* of it to their creditors, then it might be proper, in certain circumstances, to *infer* an intent on their part, because there was action on their part; or, if the debtors had a defence to the action, and remained passive, then, possibly, an intent could be inferred. But they had no defence to this action, and they did nothing, because they had nothing to do. The complainant asks, because the Bank brought suit upon a just debt, over due, and proceeded in the usual course of judicial proceedings to obtain judgment and make a levy upon the property of these debtors, that, therefore, the debtors intended to give the Bank a preference, and defeat and delay the Bankrupt Act.

In the case of *Wright vs. Filley*, in the Circuit Court for the District of Missouri, reported in 4 *Bank Register, p.* 197, which turned upon this very point, Mr. Justice Miller refused even to declare the debtor bankrupt, because the only evidence of intent was the same as in the case at bar. We quote from the opinion: "The debt on which the judgment was procured was a real debt, was due and unpaid, and the debtor had no defence to it. There is not the least reason to suppose that he desired to give the creditor who got the judgment any preference or advantage over his other creditors, or that he in any manner suggested or encouraged the suit, or the levy of the execution. * * * I cannot satisfy myself that mere honest inaction in a poor man, when his creditor seeks by law to collect a just debt, is itself an act of bankruptcy."

It is plain that the law contemplates some cases where property may be held by the creditor under a levy, from the

fact that it mentions cases where it cannot be held, and all Courts have so construed it; but if the intent is to be the *inferred* from the act, or the want of it, as the case may be, no transfer or taking can be valid, because the fact of transfer, or taking, supplies the intent.

Again, under the construction of the words asked by the complainant, there must be "insolvency," and "bankruptcy," and "knowledge" on the part of the creditor, in every case before judgment, if there was in this case; because it is impossible to obtain judgment where a debtor pays a debt when it becomes due, and the creditor must always have knowledge of the debtor's default; and only the act of bankruptcy, in this case, was the non-payment of the note upon which suit was brought.

II.

It is not claimed that there was a shadow of fraud in fact in this case. It is admitted that the Bank acted in good faith, and sought only to collect their debt by the means provided by the laws of the State of Minnesota. If the Bank had reasonable cause to believe a fraud on the act was intended, then *every* creditor must have the same cause in every case, for every creditor must have the same knowledge the Bank had, before he can begin suit and obtain judgment. But the law implies that there may be cases where the creditor has not "reasonable cause," and it must be in such a case as this, if at all.

If the debtor did not intend to commit a fraud, it can hardly be claimed that the creditor had reasonable cause to believe he did.

III.

All the proceedings in the case of the Bank against the debtors, in the State Court, were regular and in accordance with the statutes of Minnesota. The property was duly levied upon and sold by the Sheriff of Ramsey county, and there is no question that under the laws of the State, th levy constituted a valid lien. The proceedings in bankruptcy were not commenced until after the levy, after the lien had attached. The assignee takes the property in the same condition in which it was held by the bankrupt when the petition was filed, subject to all liens and incumbrances.

1 *Bank Reg.*, *p.* 139, *Re Smith.*
3 " " *p.* 71, *Re Wilbur.*
4 " " *p.* 5, *Re Wynne (by Chief Justice Chase.)*
4 " " *p.* 19, *Porter vs. Coggshall.*

The suit and levy were in the usual and ordinary course of judicial proceedings, and that, when applied to a transfer under judicial proceedings, is all that the act can intend. Under the construction claimed by the complainant in this case, State laws for the collection of debts are practically abolished, and a creditor's only safety is in a resort to the expense and delay of a bankruptcy court.

Harvey Officer
Counsel for Defendant,
St. Paul, Minn.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 514.

JAMES H. CARPENTER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 9, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 514.

JAMES H. CARPENTER, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 JAMES H. CARPENTER
vs.
THE UNITED STATES. } 2983. Filed Dec. 7, 1867.

To the hon. the judges of the Court of Claims of the United States:

James H. Carpenter, of Providence, in the State of Rhode Island, respectfully represents:

That, in the month of July, A. D. 1863, the United States Government, through Maj. E. B. Hunt, of the Corps of Engineers, acting under the orders of the Secretary of War, as the petitioner was informed, purchased of the petitioner the island in Narragansett Bay, called Dutch Island, in the town of Jamestown, county of Newport, in said State.

That, by act of 37th Congress, sess. 2, chap. 28, page 343, approved Feb. 20th, 1867, an appropriation had been made "for the erection of temporary works in Narragansett Bay, when, in the judgment of the President, the expenditure of the same or any part thereof shall be advisable, $200,000."

That, by act of 37 Congress, 3 sess., chap. 43, page 655, approved Feb 20, 1863, an appropriation had been made "for permanent defenses at Narragansett Bay, Rhode Island, $150,000."

That, by act of 39 Congress, 1 sess., chap., 115, page 62, approved June 12, 1866, an appropriation was made "for purchase of sites now occupied and lands proposed to be occupied for permanent sea-coast defenses, provided that no such purchase shall be made except upon the approval of its expediency by the Secretary of War, and of its validity of title by the Attorney-General, $35,000."

That said island was taken by the United States for purposes of fortification; that the bargain as made between the petitioner and said Hunt, was, that he should sell the island to the Government for the sum of twenty-one thousand dollars, ($21,000,) and that the Government should pay the purchase-money in five-twenty U. S. bonds, so called, and should pay it speedily; that the price was several thousand dollars below what the petitioner has asked for it, it containing seventy-five acres of the most fertile and valuable land in or around the bay, and a large portion of it having belonged to his family for several generations, but he was induced to take it for these considerations, and knowing that he could then profitably invest it; and the crops, &c., of the tenant were reserved.

2 That without waiting to complete the purchase, the Government officers took possession on or about 26th July, A. D. 1863, and commenced the erection of works. And the camp of the colored troops were soon after established there.

That the officers of the Government made great delay in the examination of the title, and this was not completed until about Dec., A. D. 1864; that he was there informed that an act of the legislature of Rhode Island ceding jurisdiction to the United States, would be necessary before anything further could be done. Such an act was procured to be passed at January session, A. D. 1865.

That he was then informed that the act of Congress of Feb. 20, 1863, did not authorize the purchase, and that further action of Congress was necessary, which was had, and an appropriation made therefor by act of June 12, 1866, above recited, and the purchase-money, $21,000, was paid to him on the 6th day of August, A. D. 1866. The deed had been executed January 1, 1864, and was, as he understood, forwarded to the

Attorney-General soon after its date. That the petitioner claimed interest on the amount from the time the contract was made and possession taken, but the engineer department rejected his claim and made an estimate for the purchase-money only.

That your petitioner agreed to take so much less than he asked solely on condition of speedy payment and in five-twenty bonds; and that from the failure of the United States to pay as their officers agreed, he has suffered a loss of eight thousand sixty-nine dollars and forty-six cents, as is shown by the statement filed, besides the abatement of $16,500, which he made in the price.

That in consequence of the possession taken by the United States, and damage done to his tenant, he was obliged to deduct a considerable sum, $300, from his rent that year.

That the island produced to the petitioner before the war, various rents, from three to six hundred dollars, having been often rented at the halves, and that a fair rent for the years it was occupied by the United States would be six hundred dollars per annum.

And he claims that the Government of the United States ought, in equity and good conscience, to remunerate him for his actual loss, as per estimate, amounting to $8,069.46, or at least the interest of the purchase-money, and if that cannot be done, then by the payment of an equitable rent.

The evidence of Major Hunt's authority from the Secretary of War, &c., *are* not in the possession of the petitioner, but he herewith files such papers as he has in his possession relating to the subject.

That no assignment whatever of this claim or any part of it, or any interest thereon, has been made, but the petitioner is the sole owner thereof, and he is a citizen of the U. S., and has at all times borne true allegiance to the Government of the United States, and has not
3 in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

JAMES H. CARPENTER.

STATE AND DISTRICT OF RHODE ISLAND:

James H. Carpenter, the foregoing petitioner, on oath says, that no assignment or transfer of his said claim, or any part thereof, or any interest therein, has been made by him; that he, the said claimant, is fully entitled to the amount in his petition claimed from the United States, after allowing all just credits and offsets, and that he believes all the facts stated in said petition to be true.

JAMES H. CARPENTER.

U. S. OF AMERICA,
STATE AND DISTRICT OF RHODE ISLAND,
City of Providence, Oct. 29, 1867.

Sworn to by said John H. Carpenter before me.

JOSEPH S. PITMAN,
Commissioner of the U. S. Circuit Court in and for the District aforesaid.

4 In the United States Court of Claims. December term A. D. 1869.

JAMES H. CARPENTER
vs.
THE UNITED STATES. } No. 2983.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the

same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And, as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of eight thousand and sixty-nine dollars and forty-six cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And, as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THO'S H. TALBOT,
Assistant Attorney-General.

5 In the Court of Claims of the United States.

JAMES H. CARPENTER
vs.
THE UNITED STATES. } No. 2983.

Special plea for defendants.—Filed M'ch 14, 1871.

And the said defendants, by their Attorney-General, now come, and, by leave of court, (as expressed in Rule IX,) say that the said claimant ought not further to maintain said action, because—

1. While the claim presented in this petition is such as is ordinarily settled in an Executive Department, the petition does not set forth the decision thereon of the proper Department of the Government to which application was, as is alleged, made for the payment of the claim. (Rule II.)

2. The petition does not set forth a full statement of the action, on the claim therein presented, by a Department of the Government, as required by section 1 of the act of February 4, 1855.

3. The evidence in the case does not show that any such application has ever been made to any Department of the Government, whether with or without success, or any action whatever thereon, without which action this court has no lawful jurisdiction in this case.

And the said defendants pray judgment, &c.

THOMAS H. TALBOT,
Assistant Attorney-General.

6 In the Court of Claims.

JAMES H. CARPENTER
vs.
THE UNITED STATES. } 2983.

At a Court of Claims held at the Capitol, in the city of Washington, fifteenth of May, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said James H. Carpenter take nothing by his suit, and that his petition be dismissed.

By the court.

A true copy.

7 In the Court of Claims.

JAMES H. CARPENTER
vs.
THE UNITED STATES. } 2983.

The claimant prays an appeal to the Supreme Court of the United States from the judgment of the Court of Claims rendered in this cause on the 15th day of May, in the year eighteen hundred and seventy-one.

July 15, 1871.

JA'S M. CARLISLE,
JOHN D. McPHERSON,
Att'ys for Claimant.

Filed in clerk's office July 27, 1871.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

8 In the Court of Claims. Dec. term.

JAMES H. CARPENTER
vs.
THE UNITED STATES. } 2983.

This case having been heard before the chief justice and judges of the Court of Claims, at the city of Washington, on the day of , 187 , the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

This claim is for the use and occupation of Dutch Island, in Narragansett Bay, and is found to rest on the following facts:

On the 7th of July, 1861, Major Hunt, of the Corps of Engineers, wrote to Brigadier General Totten, Chief of Engineers, at Washington City, District of Columbia, suggesting the propriety of purchasing Dutch Island, Narragansett Bay, as a suitable site for the coast defense, and a camp ground for volunteers and militia in training for active service in the field.

On the 10th of the same month General Totten, Chief of Engineers, authorized Major Hunt to negotiate for the conditional purchase of the island, with directions that the owner of the island was to understand that no bargain will be binding without the approval of the Secretary of War. Pursuant to these instructions negotiations were set on foot for the purchase of the island; and, after mature deliberation, Carpenter, the claimant, agreed to sell and convey the land, together with the improvements thereon, to the United States, for the sum of $21,000.

The terms of the bargain were laid before the Secretary of War, which he approved on the 20th of July, 1863, and on the next day Major Hunt was authorized, by telegram, to close the purchase. He did so verbally, and early in August thereafter the United States, by their officers, entered, with the consent of the claimant, into the possession of the premises and began to prepare for fortifying the island, and they have held and occupied it ever since.

On the 1st of January, 1864, the claimant executed a deed to the

United States for the land sold, which, after some delay, was, on the 31st of October, 1864, examined and approved, so far as the validity of the title was concerned, by the Attorney General. But in his opinion he called attention to the joint resolution of Congress, approved September 11, 1841, (5 Stat., 464,) requiring the assent of the legislature of Rhode Island to the purchase and the cession of jurisdiction over the land before any public money could be paid for it. Subsequently the legislature of Rhode Island, on or about the 24th of January, 1865, gave its assent to the purchase, and ceded jurisdiction to the United States over the island.

Soon after this, Mrs. Carpenter, the wife of the claimant, in February, 1865, acknowledged the deed executed theretofore by her husband. No money up to this time had been paid or tendered to the claimant for the land, although it was understood at the time of the parol agreement it was to be promptly paid. It was supposed that the money appropriated by the act of February 20, 1863, could be applied to this purpose; but this question was submitted to the Attorney-General, and on the 20th of April, 1865, he returned his answer, in which he held
9 that the money appropriated by this act could not be applied to this purpose. He further decided that under the act of May 1, 1820, (3 Stat., 568,) an Executive Department had no power to purchase land on account of the United States, and that all such purchases were illegal.

In this state of the case Congress, on the 12th of June, 1866, (14 Stat., 62,) appropriated $35,000 for sites then occupied, and proposed to be occupied for permanent sea coast defence.

The purchase-price of the island, $21,000, was shortly thereafter, on the 7th of August, 1866, paid to and accepted by the claimant, and the United States now hold his deed for the property.

The court further find that the claimant bore true allegiance to the United States, and gave no aid or comfort to the rebellion; and that the fair and reasonable rents and profits of the land sold, from August 1, 1863, to August 7, 1866, when the purchase-money was finally paid, were $400 per annum.

By the court.

10 In the Court of Claims.

JAMES H. CARPENTER *vs.* THE UNITED STATES. } No. 2983.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitors for claimant for the allowance of an appeal, as filed in the clerk's office, July 27, 1871, and of the order of the chief justice of said court, allowing the same; of the findings of fact, upon which the said court founded its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 9th day of December, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 514. James H. Carpenter, appellant, vs. The United States. Court of Claims. Filed 9th December, 1871.

REC. 514—2

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In the Supreme Court of the United States.

OCTOBER TERM, 1873.

JAMES H. CARPENTER, *Appellant,*
vs.
THE UNITED STATES.
No. 66.

BRIEF FOR APPELLANT.

This is an appeal from the Court of Claims.

The suit was brought to recover compensation for the use and occupation by the United States of an island in Narragansett bay, called Dutch Island, containing about 75 acres, which was taken possession of by the United States in August, 1863, and occupied for military purposes until the final purchase of it by the United States in August, 1866. Judgment was given for the defendants.

The facts found by the Court of Claims

are substantially these:

In February, 1863, Congress having made an appropriation for fortifying Narragansett bay, the engineer department of the army entered into negotiations with the claimant for the purchase of Dutch Island, in said bay, and the claimant agreed to sell to the United States for the sum of $21,000. The terms were approved by the Secretary of War, and the engineer officer verbally closed the purchase, and thereupon, with the consent of the

claimant, took possession of the island, and prepared to fortify it. The advice of the Attorney General being asked as to the validity of the title offered by the claimant, and the application of the said appropriation to the purchase, he reported that the title was good, but that the department had no authority to purchase land, but was positively prohibited by law to do so until Congress should have expressly, by statute, authorized such purchase.

June

It was not till ~~January~~, 1866, that the requisite authority was obtained from Congress, and the purchase was consummated in August, 1866, when the claimant received the agreed sum of $21,000 and no more.

Upon these facts the court ruled that the claimant could recover nothing for the use and occupation of his land by the United States in the meantime.

Assignment of Error.

The court erred in ruling that the claimant could not recover for the use and occupation of the land for the time prior to the passage of the act of Congress authorizing the purchase; being prior also to the payment of the purchase money.

Points.

We do not admit that the rules governing actions for use and occupation between private parties govern this case. There is an element in this case which does not exist between private parties. The engineer officers had a right to enter and fortify the island with or without the consent of the claimant; and if he had not consented, they could still have entered, and would not have been trespassers, and compensation would have been due the claimant under the Constitution, even although the entry was against his will.

Now, it has never been supposed that one who got into

possession of land under a contract of purchase was to pay nothing for the use of it if he refused to perform his contract. The ruling has been in some cases that he could not be held liable in an action for use and occupation; that is, to an implied contract; but might be sued in trespass, but no trespass could be committed by the United States under the circumstances of this case, and any technical rule, founded on the liability of individuals, should not be enforced in the case of Government, to which it does not apply.

The view taken by the Court of Claims of the law applicable to the case, is found in the last four paragraphs of their opinion on p. 162 of 6th Court of Claims Reports, and consists of these propositions, the order only being changed:

1. This is an action for use and occupation.

2. "The law which gives the action for use and occupation always requires that some contract of demise should subsist."

3. "The relation of landlord and tenant must be established."

4. There can be no implied contract in this case, because there was an express contract, "for there can be no implied promise in law, except in the absence of express promises. *Expressum facit cessare tacitum.*"

To the contrary of this it is—

1. Respectfully insisted that the action for use and occupation was not given by the statute to which the court refers—the statute of 4 Geo. II, chap. 19, but existed at common law.

2. That no demise is required to sustain the action.

3. That in many cases the law will imply a contract for use and occupation when the defendant has entered an express contract for purchase.

ited by the Court of Claims in support of
e Rutland *vs.* Poinset, 2 Taunton, 145; Lit-
, 7 Pick., 301; Bancroft *vs.* Wardwell, 13
Smith *vs.* ——, 6 Johns., 46.

The case from Taunton does not support the position of the court.

The plaintiff in that case had contracted to sell the property, *and the defendant had paid the full price* before it was due, and in consideration thereof he had been let into possession. The plaintiff having failed to make title, and having been obliged to refund the purchase money, brought an action for use and occupation. The report says, "Mansfield, C. J., at first inclined to think the action might be supported; for that if a man had contracted for the purchase of an estate of the annual value of many thousand pounds, and had through the imprudence of the vendor been permitted to take possession, which he might possibly retain for several years pending the discussion of the title in a court of equity, it would be strange if the purchaser could hold possession and receive the profits during all that time without paying any consideration for it to the vendor. *But upon the ground that during all the defendant's occupation of the premises the plaintiff had been in possession of the purchase money, of which he had made or might have made interest, the Chief Justice directed a non-suit, with liberty to move to set it aside.*" On the motion for the rule the Chief Justice said he doubted extremely whether in any case the plaintiff could recover. If no money had been paid it might perhaps be a different question, but if one paid his money and took possession, he asked, "Is it not "just that one party should take back his money, and the "other take back his house?"

The case in Pickering was precisely the same. And the court commenced the opinion by saying, "This case, if it must be determined for the plaintiff, would produce great injustice," and went on to say, "The interest of the money

received by the intestate [the action was by his administrator] was just equivalent to the sum charged for rent, *the intestate therefore received his rent in his lifetime.*"

The case in 13 Johnson presents a confused statement of facts, but it appears that the defendant claimed the land under a lease from a third person, and when advised of the plaintiff's claim and requested to pay something for it, replied that he would do what was right. Being subsequently applied to by plaintiff he denied his right to the land. The court said, to maintain the action, the relation of landlord and tenant must exist, and that there was no facts from which a tenancy could be inferred. If the defendant held at all under the plaintiff, it was as purchaser, and as such was not liable on the authority of the case in 6 Johns.

The case in 6 Johns. was one where the defendant went into possession under an agreement to purchase, and when a title was offered him refused to comply. Plaintiff was non-suited, and the Superior Court of New York sustained the non-suit squarely on the ground that "at common law no action of assumpsit *for rent* would lie except upon an express promise made at the time of the demise. The present action is given by the Statute of 11 Geo. II, c. 19, § 14. But the statute, from the terms of it, seems to apply only to the case of a demise and where there exists the relation of landlord and tenant founded on some agreement creating that relation." The court proceeds to say, that the defendant had entered under an agreement which might have been enforced in equity, and that when he refused to perform, he changed himself into a trespasser, and in that character was liable to be turned out, and responsible for mesne profits.

And we cite the following authorities to sustain our propositions:

In Churchwarden *vs.* Ford, 2 H. and N., 446, 448, Baron Bramwell said:

"The action for use and occupation existed before the 11 Geo., II, ch. 19, but until the passing of that act the plaintiff was non-suited if a demise was proved. Except in that particular the statute did not make the action maintainable when it could not have been maintained before."

And we submit that this is manifest from the terms of the statute itself. To the same effect is Eppes Ex'r *vs.* Cole, 1 H. and M., 161.

Addison on Contracts, p. 371, says:

"The action will be without proof of any demise on the implied promise, resulting from the simple fact of the permissive use and enjoyment of the property."

Citing Helleir *vs.* Silcox, 19 Law Journal, 2 B. 295, and other cases.

In the case of Hilleer *vs.* Silcox, in the Court of Queen's Bench, A. D. 1850, the court said:

"The plaintiff was the reversioner, and the defendant, who had married the daughter of the tenant for life, lived in the cottage with her and remained in the cottage after her death. Therefore he was not a trespasser and he set up no adverse title to the premises. *Use and occupation may well lie without a demise*, and this mode of suing is not converting a trespass into an action for use and occupation."

Starkie, Pl. IV, p. 1512, says:

"Plaintiff must prove two things and only two: First an occupation by defendant; second, that it was by permission of the plaintiff." At p. 1514, he says: 'The statute contemplates the relation of landlord and tenant.' 'The plaintiff must, therefore, prove an occupation by his per-

mission of the premises by the defendant.' And again: 'The permission to occupy may be an inference of law founded on the legal title.'" P. 1516.

In the case of Howard *vs.* Shaw, 8 M. & W., 118, the defendant had entered into possession under a valid contract of purchase, and deposited part of the price. He afterward took advantage of some dispute to demand back his deposit, and received part, but not receiving the whole kept possession, until an action of ejectment was brought against him, when he surrendered the premises. The vendor then sued for use and occupation. At the trial the point was made by defendant that the action could not be maintained, because the relation of landlord and tenant had never existed, and the Chief Baron being of that opinion, non-suited the plaintiff. Upon rule being moved for to set aside the non-suit and enter a verdict, the Chief Baron said he had entertained doubts, but was satisfied the plaintiff ought to recover, that "while the defendant "occupied under a valid contract for the sale of the property "he could not be considered as a tenant. * * But what "is the relation of the parties when the contract of sale has "gone off? The defendant remains in possession with the "consent of the landlord, but without any title to or con- "tract to purchase the land. Under these circumstances "he is a tenant at will, and if the occupation is beneficial "to him, that is sufficient to imply a contract to pay a "reasonable sum by way of compensation for such occu- "pation."

Baron Parke was of the same opinion, and said that the reason the plaintiff was not entitled to recover for the whole time of occupation was "that while the agreement "subsisted the defendant was not bound to pay rent, be- "cause the contract shows that he was to occupy without "compensation, and so long as it subsisted he was entitled "so to occupy, 'but still he was tenant at will.'"

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Baron Alderson said on the same point:

"While the defendant was in possession under this contract for sale, he was a tenant at will *under a distinct stipulation that he should be rent free*, therefore for that term no action for use and occupation can be brought against him, but when that contract is at an end, he is a tenant at will simply: therefore from that time he is to pay for occupation. Rolfe concurred. Rule absolute."

The Court of Claims, in their opinion, assume that the defendants entered under "a contract," and that this "contract" was finally consummated when the "statutory obstacles" were removed.

In fact there was no "contract" of purchase. The claimant offered to sell the land, but there was no one to buy—no one to agree to buy. He never was bound to convey, for there was no one to whom he could be bound. The contract was not "consummated" in 1866; it was made in 1866. His offer was a continuing offer, which he could have withdrawn at any time, and it was not accepted till 1866. There was no statutory obstacle "removed," but statutory power was given. The act of May, 1820, was not repealed, nor its provisions suspended—they were complied with.

In all these particulars it appears to us that the Court of Claims took erroneous views of the nature of the transaction.

Our view of the law upon the authorities above cited is this:

1. Whenever one occupies the land of another by the consent of the owner without any express contract for such compensation, the law implies a contract to pay what the occupation is reasonably worth.

2. Where a vendee enters, in pursuance of a contract for purchase, and such contract fails by his default, he is

liable to make compensation to the vendor for the entire time of his occupancy. And

3. When the contract fails by the default of the vendor, the vendee is liable to make compensation, if not for the whole time, still for the time he occupies after the breach of contract.

In this case we hold that the defendants entered without any express contract.

1. Because the court does not find that the entry was provided for by the contract or was in pursuance of it, but only that after the terms had been agreed on ["thereafter"] the defendants entered with plaintiff's consent, by which we understand a separate and distinct act of assent to the immediate occupation—whereas the contract of purchase contemplated no occupation until the deed was accepted and the money paid.

2. Because there was no contract, the United States officers being wholly without authority to contract.

But if the United States are to be considered as having taken possession under a contract, that contract was broken on the 1st of January, 1864, for on that day the claimant tendered a deed "which was examined and approved, so far as the validity of the title was concerned, by the Attorney General," and the United States did not accept the deed or pay the money. This was a breach of the contract.

Measure of Damages.

The amount of damages should be measured by the interest on the purchase money. The parties had agreed that such was the value of the land, and the mere value for *agricultural purposes* is not the whole value.

Conclusion.

We submit that the judgment of the Court of Claims

should be reversed and the case remanded, with direction to enter judgments for the appellant. And—

1st. If this court holds, upon the facts found, that the defendants did not enter under a contract of purchase, then to enter judgment for the whole time from the commencement of the occupation till the time of purchase.

2d. If the court shall be of opinion that the defendants entered under a contract of purchase, then to enter judgment for the occupation from the time of such contract broken, or January 1, 1864.

J. M. CARLISLE.
J. D. McPHERSON,
For Appellant.

OCTOBER 30, 1873.

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In the Supreme Court of the United States.

OCTOBER TERM, 1873.

JAMES H. CARPENTER, *Appellant*,
vs.
THE UNITED STATES. } No. 66.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

JAMES H. CARPENTER, *Appellant*,
vs.
THE UNITED STATES. } No. 66.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

This claim is for compensation for the use and occupation, from August, 1863, to August, 1866, of Dutch Island, in Narragansett Bay, then owned by the claimant.

The basis of the claim is, that, in 1861, negotiations were set on foot, under the authority of the Chief of Engineers, to purchase the island for the United States, as a site for coast defence, &c. The issue of these dealings was that the claimant agreed to sell the island at the price of $21,000. The bargain was approved by the Secretary of War in July, 1863, and thereupon the military took possession, and began to fortify, &c.

Owing to delays occasioned by the inadvertence both of the claimant and of the officers with whom he dealt, the land was not accepted by the United States until by act of June 12, 1866, and the above price was paid in August thereafter. Amongst the obstacles not adverted to by the above parties was the want of an Act

of the State of Rhode Island ceding jurisdiction, which was obtained January 24, 1865; also the want of a law authorizing officers of the United States to purchase the land, as required by act of May 1, 1820, sections 6 and 7, (III Stat., 568,) which want was supplied by the above act of June 12, 1866.

The plaintiff asks in this action to be compensated for the use of the island, from the time possession was taken, up to that when the price was paid.

The action of the officers, in contracting for the island, has been ratified by Congress only so far as there was a contract to buy. Any other dealings were unauthorized, and remain *in statu quo*. It is hardly pertinent to discuss their character, although there seems to have been no contract at any time except for purchase. All outside of that remains mere *appropriation* by the army, compensation for which can be had only by resorting to Congress. Filor's Case, 9 Wall., 45.

Delay in completing purchases for the Government is usual, and should be calculated upon. Meanwhile it is understood that the United States pay no interest, unless where Congress is satisfied that equitable dealing requires it. The substance of the claim here is for interest on a principal sum agreed upon in 1863 as the consideration for land then taken possession of for the United States. The plaintiff cannot change the character of his demand by clothing it in the shape of an action for *use and occupation*.

We rely, besides, upon the objection to a recovery taken by the court *below*, which objection, like the above, arises from the absence of a contract for use and occupation; and we cite, as authorities which, in their detail, come nearer this case than any we have met: Winterbottom *vs.* Ingham, 7 Q. B., 611; (53 Eng. C. L.;) Smith *vs.* Stewart, 6 Johns., 46; Little *vs.* Pearson, 7 Pick., 301; Vanderheuvel *vs.* Storrs, 3 Conn., 201. See, also, Loyd *vs.* Hough, 1 How., 153; Smith, Land. & Ten., 140, note 19.

GEO. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.